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No. 96-606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INDU CRAFT, INC.,

Petitioner,

vs.

BANK OF BARODA and KRISHNAKANT C. CHOKSHI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Re-Examination Clause of the Seventh Amendment of the United States Constitution prohibit the Court of Appeals from ordering an equitable set-off that does not disturb the jury verdict?

2. Should a federal court exercising diversity jurisdiction award post-judgment interest under the federal interest statute, 28 U.S.C. section 1961, or under applicable state law?

3. Should post-judgment interest under 28 U.S.C. section 1961 commence from the date of: (a) the original judgment entered after the jury verdict, which was set aside by the trial court and later reinstated by the Court of Appeals; or (b) the final judgment entered after reversal and remand by the Court of Appeals?

4. May pre-judgment interest be compounded under New York law where the petitioner failed to raise the issue before the trial court?

5. When a plaintiff recovers on a prima facie tort claim, can the District Court dismiss that portion of the claim which seeks punitive damages as a matter of law?

LIST OF PARTIES

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Bank of Baroda states that it is wholly owned by the government of India and has no corporate parent or subsidiary. Respondent Krishnakant C. Chokshi is a natural person having no corporate parent or subsidiary.

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STATEMENT OF THE CASE

Indu Craft, Inc. ("Petitioner") is a New York corporation that imported ladies' sportswear from the Far East and sold those goods wholesale in the United States. App. A at 4a.[1] Respondent Bank of Baroda (the "Bank") is owned and

[1] The Appendices to the Petition for Writ of Certiorari shall be cited as "App. __ at __."

operated by the government of India and is licensed to do business in New York. App. C at 21a. Krishnakant C. Chokshi, now a retired officer of the Bank, is also a Respondent to this Petition.

Petitioner's relationship with the Bank began in 1983 when it was granted a $500,000 line of credit. App. A at 5a. The line was periodically increased, reaching $2.7 million by 1986. *Id.*

As security for the line of credit, Petitioner, among other things, executed a promissory note dated December 15, 1986 in favor of the Bank in the amount of $2.7 million (the "Note"). App. C at 22a. Under the terms of the Note, due to Petitioner's default, the Bank was entitled to default interest and attorneys' fees incurred in recovery of the balance due under the Note. App. C at 23a.

On or about March 31, 1987, the Bank reduced the maximum amount of credit it was willing to extend to Petitioner from $2.7 million to $2.3 million. App. A at 6a. Consequently, on October 15, 1987, Petitioner commenced this action in the United States District Court for the Southern District of New York (the "District Court"), in which it alleged that the Bank and Mr. Chokshi reduced the line of credit in bad faith. App. A at 3a. The Bank counterclaimed against Petitioner for, among other things, the amount due on the Note, which exceeded $1.7 million. *Id.*

On August 21, 1992, following a jury trial, judgment was entered against the Bank and Mr. Chokshi in the amount of $4,747,760.27. App. A at 7a. The judgment consisted of a $2 million award against the Bank on a breach of contract claim and a $1.25 million award against the Bank and Mr. Chokshi on a prima facie tort claim, plus pre-judgment interest. *Id.* Pursuant to the jury verdict, the judgment dismissed all of the Bank's counterclaims, including the claim under the Note. *Id.*

On December 17, 1993, the District Court granted the post-trial motions of the Bank and Mr. Chokshi, set aside the jury verdict on the breach of contract and prima facie tort claims,

and dismissed the complaint of Petitioner on the ground that Petitioner failed to prove damages at trial. App. A at 3a. However, the District Court also denied the Bank's motion to set aside the jury verdict on its counterclaims and to enter judgment on the Note. *Id.* The decision of the District Court was appealed by both parties to the United States Court of Appeals for the Second Circuit (the "Second Circuit").

On February 3, 1995, the Second Circuit reversed the District Court's decision, reinstated the jury verdict in favor of Petitioner and against the Bank and Mr. Chokshi in the amount of $3.25 million, and awarded the Bank recovery on the Note. App. A at 2a-17a. The Second Circuit instructed the District Court to enter a judgment consistent with its February 3, 1995 decision. App. A at 17a. On February 17, 1995, Petitioner filed a Petition for Rehearing with the Second Circuit seeking recovery of punitive damages on its prima facie tort claim. On March 22, 1995, the Second Circuit denied Petitioner's Petition for Rehearing without opinion.

On April 26, 1995, the Bank moved before the District Court for an award of interest and attorneys' fees pursuant to the Note. App. C at 23a. The District Court denied the Bank's motion for interest and attorneys' fees on the Note and off-set the $3.25 million jury verdict by only the principal amount due on the Note of $1.7 million. *Id.* Accordingly, judgment in the amount of $2,268,865.43, which included pre-judgment interest, was entered on August 18, 1995. *Id.* Thereafter, on October 19, 1995, the judgment was amended to include post-judgment interest at the applicable federal rate of 3.41 percent from August 21, 1992 to October 19, 1995. The amended judgment amount is $2,519,822.29. App. C at 24a. On June 13, 1996, the Second Circuit issued a written opinion affirming the amended judgment entered by the District Court. App. C at 20a-33a.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD NOT BE GRANTED ON THE ISSUE OF WHETHER THE SECOND CIRCUIT'S EQUITABLE SET-OFF VIOLATES THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT.

A. This Issue Was Never Raised Or Considered Below.

Petitioner admits that it never raised below the issue of whether the Second Circuit's equitable set-off violated the Re-Examination Clause of the Seventh Amendment. *See* Petitioner's Brief[2] at 13 n.4. To preserve its right to appeal to this Court, Petitioner should have moved for rehearing on this issue pursuant to Rules 35(b) or 40 of the Federal Rules of Appellate Procedure following the February 3, 1995 decision of the Second Circuit. This Court has often held that it would not address arguments that were not raised or considered below. *See, e.g., Holly Farms Corp. v. National Labor Relations Bd.*, __ U.S. __, 116 S. Ct. 1396, 1402 n.7 (1996); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, __ U.S. __, 116 S. Ct. 873, 880 n.5 (1996); *Department of Revenue of Montana v. Kurth Ranch*, __ U.S. __, 114 S. Ct. 1937, 1942 n.9 (1994); *United States v. Alvarez-Sanchez*, __ U.S. __, 114 S. Ct. 1599, 1605 n.5 (1994); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, Petitioner has not identified any exceptional circumstances to persuade the Court to address this issue. Thus, this Court should not grant certiorari on the ground that Petitioner has waived its right to appeal this issue.

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[2] References to the Petition for Writ of Certiorari shall be cited as, "Petitioner's Brief at __."

B. The Second Circuit's Action In Ordering An Equitable Set-Off Was Consistent With Prior Decisions Of This Court Regarding The Seventh Amendment.

This Court has long held that the Seventh Amendment right to a jury trial only applies to legal, not equitable actions. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-41 (1989) (citing *Parsons v. Bedford*, 3 Pet. 433 (1830)); *Tull v. United States*, 481 U.S. 412, 417 (1987). In determining whether a right to a jury trial attaches, a court must "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42; *Tull*, 481 U.S. at 417-18.

It is also well-established under decisions of this Court that remedies for restitution or disgorgement of improper profits are equitable in nature. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("we have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'"); *Tull*, 481 U.S. at 425 ("an action for disgorgement of improper profits [is] traditionally considered an equitable remedy" and "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'"); *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (backpay, a form of restitution, is an equitable remedy); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) ("[r]estitution . . . lies within that equitable jurisdiction.").

Where an action involves both legal and equitable claims or remedies, this Court has instructed that the legal issues should first be tried by a jury, and the equitable issues are to be subsequently determined by the judge after the jury verdict. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962).

Here, the Second Circuit ruled that it had ordered an equitable set-off to avoid giving Petitioner a windfall and to "place Indu Craft in the position it would have been in but for

the Bank's breach of contract." App. A at 17a; App. C at 27a. In its second decision, the Second Circuit explicitly stated that the set-off was *equitable* in nature, stating that "[i]n sum, our direction to reduce Indu Craft's award by the amount of Baroda's counterclaim was based on *equitable principles* . . . ." App. C at 27a (emphasis added). The Second Circuit did not disturb the jury's verdict denying the Bank recovery on the Note. App. A at 16a-17a. Indeed, had the Second Circuit disturbed the jury verdict, as Petitioner contends, the Second Circuit would have awarded the Bank interest and attorneys' fees on the Note. However, the Second Circuit explicitly stated that the Bank was not entitled to recover interest and attorneys' fees on the Note because "[i]t is plain that we did not disturb the jury's finding that Baroda's bad faith in reducing the credit line caused Indu Craft's inability to honor the promissory note. Rather, we allowed the set-off simply to avoid a windfall to Indu Craft." App. C at 27a. In sum, the Second Circuit's decision did not violate the Re-Examination Clause of the Seventh Amendment.[3]

II. IT IS WELL-SETTLED AMONG THE CIRCUITS THAT POST-JUDGMENT INTEREST IN A DIVERSITY CASE IS GOVERNED BY 28 U.S.C. SECTION 1961.

Petitioner has requested certiorari to decide whether post-judgment interest in a diversity case is governed by federal or state law. This Court should not grant certiorari to hear this settled issue as there is no genuine conflict among the circuit courts and the Second Circuit's ruling was consistent with this Court's rulings on conflicts of law.[4]

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[3] The fact that the Second Circuit reduced the amount of Petitioner's recovery on the jury verdict, standing alone, is insufficient to raise a Seventh Amendment claim. Indeed, this Court has held that the reduction of a jury award by remittitur does not run afoul of the Seventh Amendment. *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935).

[4] Petitioner also admits that "this issue was not squarely addressed before the lower court." Petitioner's Brief at 20 n.6. Thus, having failed to raise

(Footnote continued)

A. There Is No Genuine Conflict On This Issue.

The various Courts of Appeals to rule on this issue have uniformly held that post-judgment interest in diversity cases is governed by 28 U.S.C. section 1961. *See, e.g.*, *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976, 987 (5th Cir. 1996); *Dopp v. Pritzker*, 1995 U.S. App. LEXIS 30838, at *20 (1st Cir. Oct. 26, 1995); *Insurance Co. of North America v. Lexow*, 937 F.2d 569, 572 (11th Cir. 1991); *Mobil Exploration & Producing North America, Inc. v. Graham Royalty Ltd.*, 910 F.2d 504, 509 (8th Cir. 1990); *Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1423 (10th Cir. 1990); *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989); *Forest Sales Corp. v. Bedingfield*, 881 F.2d 111, 113 (4th Cir. 1989); *Pierce Assocs. v. Nemours Found.*, 865 F.2d 530, 548 (3d Cir.), *cert. denied*, 492 U.S. 907 (1989); *Gulf Oil Corp. v. Kruer*, No. 87-5636, 1988 U.S. App. LEXIS 3405, *5 (6th Cir. 1988); *Northrop Corp. v. Triad Int'l Marketing S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988).

The cases that Petitioner cites in support of its position that post-judgment interest is governed by state law were all decided prior to the 1982 amendment of 28 U.S.C. § 1961. *See* Petitioner's Brief at 15. Before the 1982 amendment, the statute had directed federal courts to use the interest rate provided by state law to calculate post-judgment interest. 28 U.S.C. § 1961 (1976 ed.). In 1982, Congress amended the statute to provide a uniform federal interest rate, based on the 52-week Treasury bill rate. 28 U.S.C. § 1961 (1982 ed.); *see also Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 831-32 (1990). Thus, the cases cited by Petitioner are all inapplicable to interpret the revised statute and fail to create any conflict among the Circuits.

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this issue below, Petitioner has waived its right to have this Court grant certiorari on the issue. *See supra* at I.A.

B. The Second Circuit's Ruling Is Consistent With This Court's Interpretations Of The Erie Doctrine.

This Court has never interpreted the *Erie* doctrine to require a federal court, in a diversity case, to apply a state statute in the face of a directly conflicting federal statute governing conduct in the federal courts. Instead, in *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court clarified the *Erie* doctrine to hold that federal courts are required to apply the Federal Rules of Civil Procedure in diversity cases, even where there is a direct conflict with a state rule. 380 U.S. 460 (1965). As this Court explained in *Hanna*:

> the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. . . .
>
> * * *
>
> Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna, 380 U.S. at 472-74. The reasoning in *Hanna v. Plumer* should apply equally to a Congressionally-enacted statute governing interest.

Lower courts that have expressly addressed the issue of whether the *Erie* doctrine requires application of a state

interest rate have concluded that the federal statute should prevail. *Transpower Constructors*, 905 F.2d at 1424; *Forest Sales Corp.*, 881 F.2d at 111-13; *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 623 (5th Cir. 1988); *Northrop Corp.*, 842 F.2d at 1156; *Weitz Co., Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385 (8th Cir. 1983). Following the reasoning of *Hanna v. Plumer*, these courts have concluded that federal courts must apply the applicable federal statute over a conflicting state provision, unless the federal statute is unconstitutional. *Weitz*, 723 F.2d at 1386; *Nissho-Iwai Co.*, 848 F.2d at 623. They have further reasoned that Congress has the constitutional authority to enact a statute governing interest because post-judgment interest is "in some sense 'substantive,' in that it is a part of the damages recovered by the winning side, [but] is also easily susceptible of characterization as 'procedural,' since it has to do exclusively with events that occur after a dispute gets to court" and "therefore, is at most in 'the uncertain area between substance and procedure,' and 'rationally capable of classification as either.'" *Weitz*, 723 F.2d at 1386; *Nissho-Iwai Co.*, 848 F.2d at 623-24.

Finally, application of the federal interest rate is unlikely to lead to forum shopping. As the Eighth Circuit noted, "[i]t seems unlikely that a plaintiff would select a forum simply because of the rate of interest that a judgment will bear, because there is no way to know what the rate will be until the judgment is entered." *Weitz*, 723 F.2d at 1387; *see also Forest Sales Corp.*, 881 F.2d at 113. "Rules regarding post judgment interest 'do not furnish any greater incentive[] to use the courts of the United States than most of the other procedural features which are unique to the federal forum." *Transpower Constructors*, 905 F.2d at 1424 (quoting *Nissho-Iwai Co.*, 848 F.2d at 624). Therefore, the Second Circuit's ruling was consistent with *Erie* and *Hanna v. Plumer* and certiorari should be denied.

III. THE SECOND CIRCUIT'S RULING THAT POST-JUDGMENT INTEREST ACCRUES FROM THE DATE OF THE ORIGINAL JUDGMENT FOLLOWS THE TEACHING OF *KAISER* AND NO GENUINE CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

A. The Second Circuit's Ruling Does Not Conflict With *Kaiser.*

The Second Circuit's decision was not inconsistent with this Court's holding in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990).[5] In *Kaiser*, this Court articulated that the test for determining whether interest should be calculated from an earlier judgment or a later judgment is whether damages have been ascertained in any meaningful way in the earlier judgment. 494 U.S. at 836. Based on the facts in *Kaiser*, this Court held that where the earlier judgment had been overturned by the District Court because the evidence did not support the damage award and where the District Court's ruling was never appealed, the earlier judgment did not ascertain damages in any meaningful way. Accordingly, the *Kaiser* court found that pre-judgment interest should not accrue from the earlier judgment. *Kaiser*'s specific holding was necessarily limited to the facts of that particular case. 494 U.S. at 870 (White, J., dissenting).

In determining that post-judgment interest should accrue from the date of the original judgment, the Second Circuit below followed the general rule established in *Kaiser* and determined that, with respect to Petitioner's claims, "the judgment was ascertained in a meaningful sense on August 21, 1992, the date on which the original judgment was entered

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[5] Petitioner also concludes, without explanation, that the decision below conflicts with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See* Petitioner's Brief at 23. *Munsingwear* involved an issue of *res judicata* where an appeal had been dismissed for mootness but the underlying judgment was never vacated. *Munsingwear*, 340 U.S. at 37-39. As such, it has no relevance to the issue of when post-judgment interest accrues.

following the jury verdict." App. C at 31a-32a. Moreover, the Second Circuit distinguished the facts of this case from *Kaiser*, noting that it had reinstated the jury verdict on Petitioner's claims against the Bank and Mr. Chokshi in full and had found that with respect to Petitioner's claims, the "original judgment was sufficiently substantiated by the evidence." App. C at 32a. Thus, the Second Circuit's ruling below does not conflict with *Kaiser* and certiorari should be denied.

B. There Is No Genuine Conflict Among The Circuits.

The Second Circuit's decision also does not conflict with rulings of the Fifth, Ninth or District of Columbia Circuits, as Petitioner claims. *See* Petitioner's Brief at 21-23. All of the cases cited by Petitioner followed the general principles established in *Kaiser* and held that post-judgment interest should run from the date of the original judgment, not the judgment entered on remand after appeal.[6] *See* Petitioner's Brief at 21-25. Thus, rather than establish any conflict among the circuits, the cases cited by Petitioner apply the *Kaiser* rule and, to that extent, they are all in accordance with the Second Circuit's decision.

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[6] *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614 (D.C. Cir. 1980), was decided before *Kaiser* and, therefore, is irrelevant. Similarly, *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987) (Petitioner's Brief at 22), does not address the issue of when post-judgment interest accrues, but only discusses the effect of a vacated judgment on the "law of the case" doctrine. As such, it does not conflict with the Second Circuit's ruling below.

For instance, in *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 756-57 (9th Cir. 1983),[7] cited by Petitioner (Petitioner's Brief at 21), the court ruled that interest should run from the date of the original jury verdict, despite a subsequent judgment notwithstanding the verdict that was later reversed on appeal. The court reasoned that the date of the original verdict was the date that judgment should have been granted, if the court had not erroneously issued a judgment notwithstanding the verdict. *Turner,* 702 F.2d at 756-57.

In *Dunn v. Hovic*, the Third Circuit distinguished *Kaiser* in ordering that interest should accrue from the date of the original judgment. 13 F.3d 58, 60-61 (3d Cir.), *cert. denied*, 510 U.S. 1031 (1993), *cited in* Petitioner's Brief at 24. There, a jury awarded damages in favor of plaintiff, which the district court subsequently reduced on remittitur. *Dunn*, 13 F.3d at 60-61. The Third Circuit upheld the compensatory award and further remitted the punitive damage award. *Id.* The court reasoned that interest should run from the original judgment because the jury's determination of liability was upheld and "remittitur does not necessarily signify that the damages were not 'ascertained' in a meaningful way." *Id.*

The Third Circuit also ruled that interest should commence on the date of the original judgment even where a jury award was vacated as to one cause of action. *Loughman v. Consolidated-Pennsylvania Coal Co.*, 6 F.3d 88, 94 (3d Cir. 1993), *cited in* Petitioner's Brief at 24. In *Loughman*, the jury had awarded damages for the plaintiffs on causes of action for fraud, RICO and legal malpractice. Before judgment was

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[7] It should be noted that *Turner* was decided well before the *Kaiser* opinion was handed down in 1990. Similarly, two other cases cited by Petitioner as creating a conflict (Petitioner's Brief at 22 n.7), were also decided before *Kaiser*. *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1113 (5th Cir. 1985) (holding that interest should accrue from date of original judgment unless appellate court alters original judgment in more than relatively minor aspects); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1211 (7th Cir. 1989) (ruling that interest would be calculated from initial judgment since jury verdict was reinstated).

entered, the district court *sua sponte* dismissed the malpractice claim. Subsequently, the district court vacated, reinstated then re-vacated the RICO judgment. It next vacated the jury award in its entirety and ordered a new trial on damages. *Loughman*, 6 F.3d at 94. The new trial was held and new damage awards were entered for plaintiffs. On appeal, the Third Circuit reversed, holding that the district court abused its discretion in setting aside the first damage award, the first award of punitive damages was supported by the record, the malpractice verdict should be reinstated, and the dismissal of the RICO claims was proper. *Id.* In ruling that the original judgment was the applicable date for interest, the court explained that it had effectively reinstated the original judgment, for which the essential liability and damage elements had been ascertained by the jury. *Id.*

In *H.J., Inc. v. Flygt Corp.*, 925 F.2d 257, 261 (8th Cir. 1991), *cited in* Petitioner's Brief at 24, the court also applied *Kaiser*'s general rule. The Court held that even though the jury award was affirmed in part and reversed in part and the case was remanded for a new trial, because a portion of the damages awarded in the original judgment was supported by the evidence, interest would run from the date of entry of the original judgment. *H.J., Inc.*, 925 F.2d at 261.

Similarly, the First Circuit stated that interest should accrue from the original judgment where the original judgment was upheld for the most part but modified on remand. *Cordero v. Mendez*, 922 F.2d 11, 15-16 (1st Cir. 1990), *cited in* Petitioner's Brief at 24. In *Cordero*, the district court entered judgment for the plaintiffs after a jury verdict. *Cordero*, 922 F.2d at 15-16. The Court of Appeals vacated the award and remanded for a new trial because of a concern that erroneous jury instructions may have resulted in duplicative damages. *Id.* The appeals court explicitly did not disturb the jury's finding of liability. *Id.* The court interpreted *Kaiser* to mean that "where a first judgment lacks an evidentiary or legal basis, post-judgment interest accrues from the date of the second judgment; where the original judgment is basically sound but

is modified on remand, post-judgment interest accrues from the date of the first judgment." *Id.*

In *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993), *cited in* Petitioner's Brief at 25, the court similarly ruled that post-judgment interest should commence from the date of entry of the first judgment. The court noted that "[m]uch of the case law indicates that an appeals court has discretion to select an appropriate date from which interest should run." *DeLong*, 997 F.2d at 1342. In *DeLong*, the jury had rendered a verdict in favor of plaintiff, the district court ordered a new trial and the appeals court reversed and reinstated the original jury verdict. *Id.*

As is demonstrated by the wide variation of facts in the above-discussed cases, the question presented by this case is not important because it will not have broad applicability to other cases. The Second Circuit's decision was based entirely on the specific facts and procedural history of the case before it. As one court has stated, "[w]hile the general standard is well formulated, its application in particular cases is often very fact specific." *Loughman*, 6 F.3d at 98. Therefore, this Court should not grant certiorari to hear this fact-specific question.

IV. PETITIONER WAIVED THE ISSUE OF WHETHER PRE-JUDGMENT INTEREST SHOULD BE COMPOUNDED BY FAILING TO RAISE IT BELOW.

Certiorari should also be denied as to the question of whether pre-judgment interest should be compounded according to state law because Petitioner failed to raise this issue before the district court. On appeal, the Second Circuit explicitly declined to consider this issue because it was waived below. App. C at 33a. Because Petitioner offers no exceptional circumstances justifying a departure from the Supreme Court's usual rule of refusing to address issues never raised or considered below, this Court should not grant certiorari to address this issue. *See supra* at I.A.

V. THE SECOND CIRCUIT'S DECISION TO UPHOLD THE DISTRICT COURT'S DISMISSAL OF PUNITIVE DAMAGES ON THE PRIMA FACIE TORT CLAIM IS CONSISTENT WITH GOVERNING AUTHORITY.

Finally, this Court should decline to consider the issue of whether Petitioner is entitled to recover punitive damages on its prima facie tort claim where the District Court refused to submit the issue to the jury and the Second Circuit did not disturb that ruling. Petitioner claims that the Second Circuit's decision was inconsistent with the Seventh Amendment and governing authority providing that punitive damages is an issue to be considered by the jury. Petitioner's Brief at 12 and 28. In other words, Petitioner contends that it was improper for the Second Circuit to affirm dismissal of the punitive damages claim as a matter of law. Petitioner's position, however, is unsupportable.

It is well-settled that a court does not violate the Seventh Amendment when it dismisses a claim that is legally insufficient. *See Galloway v. United States*, 319 U.S. 372, 374 (1942). The cases cited by Petitioner, *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1982) and *Benigni v. City of Hemet*, 879 F.2d 473 (9th Cir. 1988), do not contradict this basic rule, for those cases do not hold that a court is compelled to present a legally insufficient punitive damages claim to the jury. *See* Petitioner's Brief at 12 and 28. In fact, several Circuits have affirmed dismissals of legally insufficient punitive damages claims. *See, e.g., Vulcan Painters, Inc. v. MCI Constructors, Inc.*, 41 F.3d 1457, 1461 (11th Cir. 1995); *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 745 (1st Cir. 1994); *L.E.S. Properties Hotel Venture, L.P. v. Westin Hotel Co.*, No. 93-55095, No. 93-55112, 1994 U.S. App. LEXIS 13092, at *4 (9th Cir. May 31, 1994), *cert. denied*, 115 S.Ct. 734 (1995)[8]; *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 942-43 (10th Cir. 1994); *Johnson*

[8] Cited subject to local rule 36-3 of the Ninth Circuit.

v. Cowell Steel Structures, Inc., 991 F.2d 474, 479 (8th Cir. 1993).

Moreover, *Le Mishal v. CBS*, 61 A.D.2d 291 (1st Dep't 1988) and *Walker v. Sheldon*, 10 N.Y.2d 401 (1961), cases on which Petitioner relies (Petitioner's Brief at 28), do not support Petitioner's contention that punitive damages are recoverable on a prima facie tort claim because plaintiffs in those cases did not assert prima facie tort claims. In fact, there are New York courts that have held that punitive damages are not recoverable on prima facie tort claims. *Walsh Bros. Inc. v. Ruppert*, 7 A.D.2d 896, 896 (1st Dep't 1959); *Winderbaum v. Winderbaum*, 39 Misc. 2d 478, 478 (Bronx Co. Sup. Ct.), *aff'd*, 20 A.D.2d 626 (1st Dep't 1963). Thus, based on the foregoing, this Court should not grant certiorari to consider whether it was proper for the Second Circuit to uphold the District Court's dismissal of the punitive damages pursuant to the facts of this case.

CONCLUSION

For the foregoing reasons, Respondents Bank of Baroda and Krishnakant C. Chokshi respectfully request that this Court deny the petition for a writ of certiorari.

New York, New York
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Respectfully submitted,

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